

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

GARRY P. FREY,

Plaintiff,

v.

SPOKANE COUNTY FIRE
DISTRICT NO. 8, a Washington
municipal corporation,

Defendant.

NO. CV-05-289-RHW

**ORDER GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

Before the Court is Defendant's Motion for Summary Judgment (Ct. Rec. 10). A hearing was held on the motion on August 29, 2006. Plaintiff was represented by Mary Giannini and R. Max Etter, Jr. Defendant was represented by Stephanie Alexander.

BACKGROUND FACTS

Plaintiff Garry Frey was employed with the Spokane County Fire District (SCFD) No. 8 from 1995 to 2004, when he resigned. During his tenure at the SCFD No. 8, he worked as a EMS Officer, as a Deputy Chief, and also held the title of Assistant Chief for a six-month period in 2001/02. When Plaintiff was first employed as a Deputy Chief, he understood that his job was exempt under the Fair Labor Standards Act (FLSA), which meant that he would not qualify for overtime pay. Plaintiff asserts that as the years passed in which he was Deputy Chief, he was assigned more duties, and much of the work he did was considered nonexempt

1 under the FLSA.

2 Spokane County Fire District No. 8 consists of four (4) stations. The
3 administrative hierarchy of SCFD No. 8 is set forth on Page 113 of Ct. Rec. 10.
4 There is one Chief that reports to the Board of Commissioners. Three Deputy
5 Chiefs report to the Chief. Each Deputy Chief is responsible for various divisions
6 or units. The chain of command under the Deputy Chiefs is Captains, then
7 Lieutenants, and finally Firefighters (Def. St. of Mat. Facts 11).

8 The SCFD is staffed by career firefighters, as well as volunteer firefighters.
9 The firefighters are specifically assigned to fight fires, and to clean and perform
10 routine maintenance on equipment, vehicles, the station grounds and the facilities.
11 In 2001, SCFD No. 8 had approximately 15 full-time career firefighters, 10 part-
12 time firefighters, 16 resident firefighters, and 44 volunteer firefighters. In 2002,
13 SCFD No. 8 had approximately 13 full-time career firefighters, 12 part-time
14 firefighters, 15 resident firefighters, and 43 volunteer firefighters. In 2003, SCFD
15 No. 8 had approximately 15 full-time career firefighters, 15 part-time firefighters,
16 11 resident firefighters and 42 volunteer firefighters. During these years, SCFD
17 No. 8 employed at least one full-time administrative assistant employee, at least
18 one part-time file clerk, who assisted the deputy chiefs with filing projects, and
19 clerical staff who were assigned duties such as answering the telephones for the
20 District, distributing mail, data entry for accounts payable, and filing.

21 The following are a list of management duties that Plaintiff, as Deputy
22 Chief, was responsible for during the years 2001-2003. These are set forth in
23 Defendant's Statement of Facts and are not opposed by Plaintiff:

- 24 (1) Responsible for managing and supervising career firefighters and
25 officers and maintenance specialists, and at some point, for managing
26 the part-time firefighters (Def. Statement of Material Facts (DSMF) 8,
27 9, 10);
- 28 (2) Responsible for managing several divisions of SCFD No. 8, including

1 risk management, EMS training, and maintenance of facilities and
2 apparatus; (DSMF 13);

3 (3) Responsible for personnel management duties, which included
4 interviewing, hiring, supervising assigned staff, assigning duties to
5 career personnel, approving leave requests, addressing personnel
6 issues, and overseeing the employee promotional and exiting processes
7 under the Collective Bargaining Agreement (DSMF 14);

8 (5) Ensure that sufficient personnel was available to meet District's
9 mission and research and recommended employee policies (DSMF
10 14);

11 (6) Review schedule to ensure that schedules prepared by Lieutenants
12 properly covered all necessary shifts (DSMF 15);

13 (7) Organize Wellness Program, which included choosing and purchasing
14 exercise equipment for firefighters, and setting up the location for the
15 exercise program (DSMF 17);

16 (8) Manage the District's EMS program, which included ensuring training
17 and procedures were followed (DSMF 18);

18 (9) Manage Ongoing Training Evaluation Program, which included
19 making sure firefighters were in compliance with the training
20 requirements of the Department of Health (DSMF 19);

21 (10) Responsible for risk management and acted as District Safety Officer.
22 Risk management included: investigating all District accidents
23 involving equipment or personnel, and addressing and making
24 recommendations in relation to workers compensation and L & I
25 claims, documenting and maintaining accurate records, and looking out
26 for the welfare of the district personnel (DSMF 20, 21);

27 (11) Oversee entire collective bargaining process; was a member of the
28 negotiating team for negotiating firefighters pay; responsible for

1 responding to employee grievances and ensuring compliance with
2 CBA (DSMF 22);

3 (12) Responsible for managing the budget for department/division and
4 assisting in planning and implementing and developing the budget for
5 the District's policies and procedures (DSMF 23);

6 (13) Code incoming invoices, which included approval of order and amount
7 to be paid; directing payment of invoice out of particular budget
8 number (DSMF 24);

9 (14) Coordinate and supervise proper maintenance of all District's
10 apparatus and facilities; supervise maintenance staff and develop
11 training program; maintain records for apparatus and equipment; test
12 apparatus and equipment; and make adjustments to dispatch system
13 settings with Chief's approval (DSMF 25, 26);

14 (15) Order and maintain supplies for the stations (DSMF 27); and

15 (16) Review and recommend changes to Standard Operating Procedure
16 manual (DSMF 28);

17 While Deputy Chief, Plaintiff also had responsibilities as an 820 call duty
18 officer. Plaintiff acted as the 820 call duty officer about 9 times a month—except
19 when other staff were on vacation, it could be higher than that. The 820 call duty
20 officer wore a digital pager that notified the on-call duty that there was an incoming
21 call to the station. The 820 call duty officer would utilize the pager, cell phone, and
22 radio while responding to or monitoring calls.

23 According to Plaintiff, the 820 call duty officer was the officer of the day
24 representing the Chief in any manner. Specifically, the 820 call duty officer would
25 respond to calls, based on the Standard Operating Procedure criteria. If the call was
26 a large scale call, then the 820 call duty officer would respond. This included going
27 to the scene and assisting the incident commander as needed. Assistance could
28 mean being in charge of a division that was responding to the fire, although this

1 occurred only occasionally. Plaintiff estimated that he fought fires less than 5 times
2 a year when acting as the 820 call duty officer.

3 If the call was an aid call, the officer would monitor the call. Monitoring
4 included listening to the radio, and determining if anything needed to be done.
5 While on-call, the 820 call duty officer did not have to stay at the station if they
6 lived close enough to the SCFD boundary. Plaintiff stated that although there was
7 not a specific response time, the unwritten rule was that the on-call officer had to be
8 able to respond within 5-10 minutes. The only restriction placed on the on-call duty
9 officer, other than response time, was that they were not allowed to drink alcohol or
10 attend movies while on-call.

11 Plaintiff also asserts that he performed the following nonexempt tasks while
12 employed as Deputy Chief:¹

- 13 (1) Document and maintain various District records;
- 14 (2) Assist in budgeting, including gathering budget information and
15 putting in it budgeting format;
- 16 (3) Respond to emails and phone calls from staff, constituents, vendors,
17 regulatory agencies;
- 18 (4) Review and process invoices, including coding invoices with bar
19 codes;
- 20 (5) Maintain, fill out, and file records for equipment testing;
- 21 (6) Check off and file supplies;
- 22 (7) Monitor shop equipment and tools;
- 23 (8) Meet with vendors, staff, resident firefighters, and volunteer
24 firefighters as needed;
- 25 (9) Input equipment and apparatus information cards regarding different
26 kinds of calls;

27
28 ¹Defendant does not dispute that Plaintiff undertook these tasks.

- 1 (10) Check time-off requests and match them with approvals;
- 2 (11) Type letters and memos according to whatever the need was;
- 3 (12) Work on maintenance bids for the station;
- 4 (13) Fight fires when needed;
- 5 (14) Move apparatus to stations for preventive maintenance;
- 6 (15) Prepare burn tower for training;
- 7 (16) Help out at the various stations moving equipment for repairs;
- 8 (17) Repair equipment in stations such as leaky faucets and sprinkler
- 9 systems;
- 10 (18) Pull and spray weeds and trim trees and bushes and other grounds
- 11 maintenance;
- 12 (19) Shovel and plow snow;
- 13 (20) Paint the facilities;
- 14 (21) Repair cracks in cement, repair windows and other facility
- 15 maintenance;
- 16 (22) Install radios, lights and sirens in vehicles;
- 17 (23) Pick up oxygen supplies;
- 18 (24) Pick up parts and supplies for EMS services;
- 19 (25) Miscellaneous housekeeping at the station, such as cleaning bathrooms
- 20 and other facilities;
- 21 (26) Put chains on snow plow;
- 22 (27) Fix drier vents;
- 23 (28) Perform blood pressure tests, and
- 24 (29) Purchase painting supplies for the stations.

25 (Ct. Rec. 14).

26 Plaintiff brings this present action seeking overtime pay in the amount of one
27 and a half times his hourly rate for all the time he worked on nonexempt duties,
28 based on the Fair Labor Standards Act, and the Washington Minimum Wage Act.

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1 Plaintiff has calculated his overtime pay to include the time he spent “on-call.”

2 Plaintiff also asserts a claim for breach of contract for unpaid wages.

3 Defendant moves for summary judgment, asserting that Plaintiff is an exempt
4 employee under the Fair Labor Standards Act and the Washington Minimum Wage
5 Act, and therefore, does not qualify for overtime pay. Defendant also asserts that
6 Plaintiff’s breach of contract claim is preempted by the Fair Labor Standards Act.

8 ANALYSIS

9 I. Standard of Review

10 Summary judgment is appropriate if the “pleadings, depositions, answers to
11 interrogatories, and admissions on file, together with the affidavits, if any, show
12 that there is no genuine issue as to any material fact and that the moving party is
13 entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). There is no genuine
14 issue for trial unless there is sufficient evidence favoring the nonmoving party for a
15 jury to return a verdict in that party’s favor. *Anderson v. Liberty Lobby, Inc.*, 477
16 U.S. 242, 250 (1986). If the nonmoving party “fails to make a showing sufficient to
17 establish the existence of an element essential to that party’s case, and on which the
18 party will bear the burden of proof at trial,” then the trial court should grant the
19 motion. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). When considering a
20 motion for summary judgment, a court may neither weigh the evidence nor assess
21 credibility; instead, “the evidence of the non-movant is to be believed, and all
22 justifiable inferences are to be drawn in his favor.” *Anderson*, 477 U.S. at 255.

23 The determination of whether an employee qualifies for an exemption under
24 the Fair Labor Standards Act is a question of law. *Cleveland v. City of Los Angeles*,
25 420 F.3d 981, 988 (9th Cir. 2005). Factual determinations regarding how the
26 employee spent his time and the nature of the employee’s duties are questions of
27 fact that must be decided by the trier of fact. *Ballaris v. Wacker Siltronic Corp.*,
28 370 F.3d 901, 910 (9th Cir. 2004) (“The nature of the employees’ duties is a

1 question of fact, and the application of the FLSA to those duties is a question of
2 law.”).

3 In his response to Defendant’s Motion for Summary Judgment, Plaintiff
4 objects to seven of Defendant’s statements of fact. For purposes of summary
5 judgment, the Court will not consider the disputed statements of fact. The Court
6 considered Defendant’s uncontested Statements of Material Facts and Plaintiff’s
7 Statements of Material Facts in deciding Defendant’s motion. As there are no
8 genuine issues of material fact, this case is ripe for summary judgment.

9 **II. Fair Labor Standards Act Claim**

10 The FLSA requires that employers ordinarily pay their employees time and
11 one-half for work in excess of forty hours per week. 29 U.S.C. § 207(a)(1). The
12 FLSA provides an exemption from overtime for persons “employed in a bona fide
13 executive, administrative, or professional capacity” and grants the Secretary of
14 Labor broad authority to promulgate regulations to “define[] and delimit []” the
15 scope of the exemption. 29 U.S.C. § 213(a)(1). It is the burden of an employer to
16 show entitlement to an exemption from the FLSA. *Baldwin v. Trailer Inns, Inc.*,
17 266 F.3d 1104, 1112 (9th Cir. 2001). The FLSA “is to be liberally construed to
18 apply to the furthest reaches consistent with Congressional direction. *Id.* (citing
19 *Klem v. County of Santa Clara*, 208 F.3d 1085, 1089 (9th Cir. 2000). To that end,
20 FLSA exemptions are to be narrowly construed against . . . employers and are to be
21 withheld except as to persons plainly and unmistakably within their terms and
22 spirit.” *Id.*

23 It is Defendant’s contention that while employed with the Spokane County
24 Fire District No. 8, Plaintiff was employed either in an executive or administrative
25 capacity, and therefore, was exempt from the overtime requirements of the FLSA.

26 To prove Plaintiff is exempt from overtime pay, Defendant must establish
27 that Plaintiff’s employment meets the requirements of the executive exemption
28 “short test” set forth in the Department of Labor regulations: (1) Plaintiff is paid on

1 a “salary basis”; (2) Plaintiff is paid “at a rate of not less than \$250 per week . . .
 2 exclusive of board, lodging, or other facilities”; (3) Plaintiff’s primary duty consists
 3 of the management of the enterprise in which Plaintiff is employed or of a
 4 customarily recognized department or subdivision thereof; and (4) Plaintiff’s
 5 primary duty “includes the customary and regular direction of the work of two or
 6 more other employees.” 29 C.F.R. § 541.1(f) (2003)².

7 **A. Salary**

8 It is undisputed that Plaintiff meets the compensation requirement. The
 9 following sets forth Plaintiff’s yearly salary for the years 2001-2003:

10	2001	\$57,706
11	2002	\$61,327
12	2003	\$64,442

13 (DSMF 3).

14 **B. Primary Duty**

15 In order to prove that Plaintiff is exempt from overtime pay, Defendant must
 16 establish that his primary duty consisted of the management of the enterprise in
 17 which Plaintiff was employed or of a customarily recognized department or
 18 subdivision. 29 C.F.R. § 541.1(f).

19 The regulations define the terms “primary duty” and “management.”
 20 Management” involves:

21 [i]nterviewing, selecting, and training of employees, setting and
 22 adjusting their rates of pay and hours of work; directing their work;
 23 maintaining their production or sales records for use in supervision or
 24 control; appraising their productivity and efficiency for the purpose of
 recommending promotions or other changes in their status; handling
 their complaints and grievances and disciplining them when necessary;

25 ²The FLSA regulations were extensively amended in 2004. Because
 26 Plaintiff terminated his employment in January, 2004, the 2003 regulations are
 27 applicable to the case at bar. The regulations cited in this order are from the 2003
 28 edition of the C.F.R.

1 planning the work; determining the techniques to be used; apportioning
 2 the work among the workers; determining the type of materials,
 3 supplies, machinery or tools to be used or merchandise to be bought,
 4 stocked and sold; controlling the flow and distribution of materials or
 5 merchandise and supplies; providing for the safety of the men and the
 6 property.

7 29 C.F.R. § 541.102.³

8 29 C.F.R. § 541.103 sets forth the standard for determining whether
 9 “management” is an employee’s “primary duty”:

10 A determination of whether an employee has management as his
 11 primary duty must be based on all the facts in a particular case. The
 12 amount of time spent in the performance of the managerial duties is a
 13 useful guide in determining whether management is the primary duty
 14 of an employee. In the ordinary case it may be taken as a good rule of
 15 thumb that primary duty means the major part, or over 50 percent, of
 16 the employee's time. Thus, an employee who spends over 50 percent of
 17 his time in management would have management as his primary duty.
 18 Time alone, however, is not the sole test, and in situations where the
 19 employee does not spend over 50 percent of his time in managerial
 20 duties, he might nevertheless have management as his primary duty if
 21 the other pertinent factors support such a conclusion. Some of these
 22 pertinent factors are *the relative importance of the managerial duties*
 23 *as compared with other types of duties, the frequency with which the*
 24 *employee exercises discretionary powers, his relative freedom from*
 25 *supervision, and the relationship between his salary and the wages*
 26 *paid other employees for the kind of nonexempt work performed by the*
 27 *supervisor.*

28 29 C.F.R. § 541.103 (emphasis added).

Here, Plaintiff asserts that while employed as Division/Deputy Chief, he
 spent at least half of his time performing numerous nonexempt duties. Defendant
 does not dispute this contention. Rather, Defendant argues that time spent
 performing nonexempt tasks does not necessarily determine whether an employee is
 exempt. Defendant is correct. *See Baldwin*, 266 F.3d at 1114 (“We do not presume
 that the executive exemption fails merely because the proportion of time spent on
 exempt managerial tasks is less than fifty percent.”)

It is undisputed by the parties that Plaintiff performed both exempt and

³The Court gives deference to the Department of Labor’s regulations
 interpreting the FLSA. *Baldwin*, 206 F.3d at 1112 n.4.

1 nonexempt tasks. In cases such as this, where the managerial duties are packaged in
2 employment with non-managerial tasks, and the management function cannot
3 readily and economically be separated from the nonexempt tasks, the circuit
4 instructs courts to give weight to the factors set forth in the regulations, other than
5 time spent on management duties, in determining whether Plaintiff's primary duty
6 was management. *Id.* at 1115.

7 **1. Time Spent on Management Duties**

8 The Court accepts Plaintiff's assertion that he spent at least fifty percent of
9 his time on nonexempt tasks.

10 **2. Relative Important of the Managerial Duties Compared to** 11 **Other Types of Duties**

12 The regulations instruct the Court to look at the relative importance of
13 Plaintiff's managerial duties compared to his nonexempt duties. The fact that
14 Plaintiff performed some of the same tasks as his subordinates does not render the
15 tasks nonexempt. *Baldwin*, 266 F.3d at 1115. Likewise, the fact that Plaintiff's
16 subordinates may have performed some managerial tasks does not demonstrate that
17 Plaintiff is a nonexempt employee. *Id.*

18 Here, it is undisputed that Plaintiff was responsible for the majority of duties
19 listed in 29 C.F.R. § 541.102. Plaintiff was involved in the hiring of the employees,
20 was responsible for the training of the employees, and directed their work. He
21 handled the employees' complaints and grievances, and made recommendations
22 with regard to discipline. He apportioned work among the employees, controlled
23 the flow and distribution of equipment and supplies, and provided for the safety of
24 the employees and property of SCFD No. 8.

25 In *Baldwin*, the circuit focused on the plaintiffs' principal value to the
26 employer in analyzing the relative importance of the managerial duties compared to
27 the nonexempt duties. 266 F.3d at 1115. In that case, it concluded that the
28 principal value to the employer was directing the day-to-day operations of the

1 trailer park that the plaintiffs managed, even though they performed a substantial
2 amount of manual labor. *Id.* (citing *Dalheim v. KDFW-TV*, 918 F.2d 1220, 1227
3 (5th Cir. 1990)) (“At least under the short tests, the employee’s primary duty will
4 usually be what she does that is of principal value to the employer, not the collateral
5 tasks that she may also perform, even if they consume more than half her time.”).

6 Here, the same can be said of Plaintiff. Plaintiff’s principal value to
7 Defendant was the managing and supervising of the divisions and unit that were
8 assigned to Plaintiff. The manual and clerical tasks that he performed were
9 undertaken in order to support Plaintiff’s primary value to Defendant, which was to
10 ensure that Plaintiff’s units were operating efficiently and effectively. Thus, the
11 relative importance of Plaintiff’s managerial duties compared to his nonexempt
12 duties support the executive exemption.

13 **3. Frequency of Exercise of Discretionary Powers**

14 The Court must also consider the frequency of Plaintiff’s exercise of
15 discretionary powers. The record supports a finding that Plaintiff frequently had the
16 opportunity to exercise discretionary powers in managing his divisions.
17 Specifically, Plaintiff exercised discretion in delegating duties to others, in
18 responding to 820 calls, in budgeting, in maintaining and ordering supplies, in
19 approving the schedule and leave requests, in implementing the Wellness program,
20 and in ensuring that the EMS officers had adequate training. Most telling of the
21 amount of discretion exercised by Plaintiff is the fact that the Chief never directed
22 Plaintiff to undertake the nonexempt tasks that Plaintiff now asserts renders his
23 employment status nonexempt. Instead, the understanding was that these tasks
24 needed to get done, and that Plaintiff had the discretion to determine how these
25 tasks would be accomplished either by delegating the tasks to his subordinates, or
26 performing the tasks himself. Plaintiff’s frequent exercise of discretionary powers
27 support the executive exemption.

28 **4. Relative Freedom from Supervision**

The relative freedom from supervision is another factor the Court must weigh in determining Plaintiff's primary duty. In this case, at all times in question, Plaintiff was second-in-command. The only person who could provide supervision to Plaintiff was the Chief. Plaintiff stated that he communicated with the Chief daily, but there is nothing in the record to indicate that the Chief directed Plaintiff's day-to-day activities. Instead, the record indicates that Plaintiff determined what tasks he would accomplish in each day, without any input from the Chief. Specifically, Plaintiff stated in his answer to Interrogatory No. 6 that if he was all caught up with the day-to-day paperwork and filing, he would head out to do rounds. Sometimes he would visit all four stations, otherwise he would make it to only one or two of the stations depending on what tasks or items needed attention on that particular day (Ct. Rec. 10-13, p. 157). Plaintiff also stated that he would arrive at work between 7:00 and 8:00 a.m., which demonstrates that Plaintiff had discretion when he could arrive each morning. Although Plaintiff suggests that there was some oversight by the Chief, *i.e.* at times the Chief would direct him to visit stations, there is nothing in the record that would indicate that the Chief's oversight was so rigorous or frequent as to undermine the fact that Plaintiff was substantially free from daily supervision. *See Baldwin*, 266 F.3d at 1115. Plaintiff's relative freedom from supervision supports the executive exemption.

5. Relationship Between Salary and Wages Paid Other Employees

The Court must also factor in the relationship between Plaintiff's salary and the wages paid to his subordinates. In this case, there is a significant difference between the exempt and nonexempt salaries. The following is breakdown of salaries of the different positions within SCFD No. 8, which was provided in Deputy Chief Vernon Blystone's declaration:

Year	Highest Career Firefighters Wages (Nonexempt)	Lieutenant's Wages (Nonexempt)	Plaintiff's Salary (Exempt)

2001	\$37,133	\$37,133 - 42,703	\$57,706
2002	\$39,361	\$39,361 - 45,265	\$61,327
2003	\$41,723	\$41,723 - 47,981	\$64,441

(Ct. Rec. 19).

Here, it is undisputed that Plaintiff was earning at least \$15,000 more a year to perform his exempt duties. This difference between the salary of Plaintiff, an exempt employee, and the wages paid nonexempt employees supports the executive exemption.

6. Occasional Tasks

The regulations recognize that an executive may occasionally perform nonexempt tasks. Specifically, 29 C.F.R. § 541.110 states:

(a) In addition to the type of work which by its very nature is readily identifiable as being directly and closely related to the performance of the supervisory and management duties, there is another type of work which may be considered directly and closely related to the performance of these duties. In many establishments the proper management of a department requires the performance of a variety of occasional, infrequently recurring tasks which cannot practicably be performed by the production workers and are usually performed by the executive. These small tasks when viewed separately without regard to their relationship to the executive's overall functions might appear to constitute nonexempt work. In reality they are the means of properly carrying out the employee's management functions and responsibilities in connection with men, materials, and production. The particular tasks are not specifically assigned to the "executive" but are performed by him in his discretion.

(b) It might be possible for the executive to take one of his subordinates away from his usual tasks, instruct and direct him in the work to be done, and wait for him to finish it. It would certainly not be practicable, however, to manage a department in this fashion. With respect to such occasional and relatively inconsequential tasks, it is the practice in industry generally for the executive to perform them rather than to delegate them to other persons. When any one of these tasks is done frequently, however, it takes on the character of a regular production function which could be performed by a nonexempt employee and must be counted as nonexempt work. In determining whether such work is directly and closely related to the performance of the management duties, consideration should be given to whether it is (1) the same as the work performed by any of the subordinates of the executive; or (2) a specifically assigned task of the executive employees; or (3) practicably delegable to nonexempt employees in the establishment; or (4) repetitive and frequently recurring.

1 29 C.F.R. § 541.110.

2 By Plaintiff's own account, many of the various nonexempt tasks he
3 performed were not repetitive and frequently recurring. Plaintiff stated that he did
4 not do many of the nonexempt duties every day, but did them when they needed to
5 be done. (Ct. Rec. 14). Specifically, Plaintiff stated that "[s]ome of the tasks, while
6 they didn't occur often, would take more than just a few minutes or an hour a day or
7 two, or more, to complete, and so took up quite a bit of time. Other tasks happened
8 regularly, and even though I might spend only a few minutes at a time, I had to do
9 the task often, sometimes every day." *Id.* Plaintiff did not specify which tasks were
10 performed daily. In reviewing the list of nonexempt tasks, however, most of the
11 tasks that could be performed daily are ones that are directly and closely related to
12 the management of the divisions—maintaining records, responding to emails, and
13 other daily clerical tasks. Also, Plaintiff did not state that he was the only one
14 responsible for shoveling snow, cleaning bathrooms, or weeding and mowing the
15 lawn. It is undisputed that Plaintiff performed these tasks at his discretion. The
16 tasks listed by Plaintiff are occasional tasks that were undertaken to properly carry
17 out Plaintiff's management responsibilities.

18 7. Other Considerations

19 In his pleadings, Plaintiff relies on the fact that he actually performed job
20 duties that were listed in six other job descriptions⁴ to argue that his position as
21

22 ⁴Several months after an on-the-job truck accident, in which he injured his
23 back and shoulder, Plaintiff asked Chief Stout to provide him with a job
24 description so he could talk to his doctor about whether he could perform the
25 functions of his job to return to work at least part-time. Chief Stout sent Plaintiff
26 seven job descriptions: Division/Deputy Chief, Emergency Medical Services
27 Officer, Risk Manager, Maintenance Officer, Resident Firefighter Officer, Career
28 Personnel Officer, and Part-Time Firefighter Officer.

1 Division/Deputy Chief evolved into a non-exempt position. Reliance on these job
2 descriptions as support for Plaintiff's contention that he was performing nonexempt
3 duties is misplaced.

4 It is undisputed that when Plaintiff was originally hired, he was responsible
5 for the EMS Division. By 2001, Plaintiff was responsible for risk management,
6 operations, personnel, and maintenance, along with EMS (Ct. Rec. 14). The seven
7 job descriptions represent the different responsibilities that were assigned to
8 Plaintiff. This makes sense when looking at the job description for Division/Deputy
9 Chief. The job description states that the Division/Deputy Chief will provide
10 administrative and management support. Specifically, the position "will be
11 assigned responsibility of District functions *which may include*: Communications,
12 Emergency Medical Service, Fire Prevention (Fire Marshal), Maintenance
13 (Apparatus and/or Facilities), Operations, and Training. (Emphasis added). The job
14 description also states that the Division/Deputy Chief will be assigned to supervise
15 and manage one or more divisions of District personnel *which may include*: Career
16 Firefighters and Officers, Part-Time Firefighters, Resident Firefighters, and
17 Volunteer Firefighters and Officers. (Emphasis added). Rather than include the
18 detailed responsibilities for each of these units and divisions in the job description
19 for Division/Deputy Chief, separate job descriptions were created for each of the
20 different divisions, which could then be assigned as needed by Chief Stout. The six
21 additional job descriptions with which Plaintiff relies are the detailed listing of the
22 duties that correspond to the department to which the Division/Deputy Chief is
23 ultimately assigned.

24 More importantly, the majority, if not all, of the duties listed in each of these
25 job descriptions describe exempt responsibilities. None of the job descriptions list
26 nonexempt tasks, such as mowing the lawn, shoveling the snow, or changing the
27 signal lights. Consequently, the fact that Plaintiff was responsible for duties set
28 forth in seven different job descriptions may support an argument that Plaintiff was

1 overworked, but it does not provide support that Plaintiff was a nonexempt
2 employee.

3 Here, Plaintiff's employment with the SCFD No. 8 meets the primary duty
4 requirement of the executive exemption because Plaintiff had the authority and
5 discretion to manage his units on a day-to-day basis without supervision and control
6 from Chief Stout, notwithstanding that he may have spent more than half of his time
7 on nonexempt tasks.

8 **c. Supervision of Two or More Employees**

9 In order to qualify for the executive exemption, Plaintiff must customarily
10 and regularly direct the work of two or more other employees. 29 C.F.R. §
11 541.1(f).

12 Plaintiff asserts that because the Chief was the chief executive and made all
13 decisions in managing the District, under the supervision of the Commissioners,
14 Defendants have not met their burden of showing that he supervised two or more
15 employees. Plaintiff's assertions are not supported by the record. Instead, the
16 record is clear that, at a minimum, Plaintiff supervised the career firefighters as well
17 as the part-time maintenance specialist, and during 2001-2003, there were more
18 than two career firefighters employed by the District. The supervision included
19 recruiting, retaining, and resolving any problems that arose. Plaintiff was also
20 responsible for ensuring optimum training for the EMS training of personnel; for
21 supervising staff assigned to assist in the effective and efficient performance of the
22 maintenance of apparatus and facilities; for supervising the resident firefighters, for
23 approving leave requests and conducting evaluations for career fire personnel on an
24 annual basis; for assigning career personnel to duty assignments which include
25 station assignments and special assignments; and for administering supervision and
26 discipline to the part-time firefighters, as required. All of these duties indicate that
27 Plaintiff was directly responsible for the supervision of two or more employees. It
28 is not necessary for Plaintiff to have final-decision making authority in order for the

1 Court to find that Plaintiff managed a unit. *See Kastor v. Sam's Wholesale Club*,
 2 131 F.Supp.2d 862, 866 (N.D. Tex. 2001) (applying precedent analyzing the
 3 administrative exemption where the Fifth Circuit held that final decision-making
 4 authority is not required to the executive exemption).⁵

5 **d. Conclusion**

6 Defendant has met its burden of proving that Plaintiff is an executive
 7 employee who is exempt from the overtime requirements of the FLSA. Plaintiff is
 8 not entitled to overtime pay regardless of whether he worked at the station or was
 9 on-call. Thus, it is not necessary to address the parties' arguments regarding
 10 whether the time Plaintiff spent on-call is compensable.

11 **III. Washington Minimum Wage Act Claim**

12 Plaintiff also alleges a claim for overtime compensation under the
 13 Washington State Minimum Wage Act (MWA). The MWA requires that
 14 employers ordinarily pay their employees time and one-half for work in excess of
 15 forty hours per week, but also provides an exemption for individuals employed in a
 16

17 ⁵In *Kastor*, the district court noted that if final decision-making authority
 18 were the test for determining whether a person was an executive or administrative
 19 employee, one would rarely, if ever, qualify as such an employee under the
 20 regulations. 131 F. Supp. 2d at 867. The district court reasoned that "[a] president
 21 or chief executive officer of a company could say that he does not have final
 22 decision-making authority because he is only authorized to carry out the policies
 23 set by the board of directors, and the board of directors is free to review and veto
 24 his decisions. Typically, there is a hierarchy or line of supervision in any corporate
 25 entity or business wherein managers and supervisors have persons to whom they
 26 must report, and that an individual does not have final supervisory or discretionary
 27 authority does not take that person out of the realm of being a manager or
 28 supervisor in the company or business." The Court finds this analysis persuasive.

1 bona fide executive, administrative, or professional capacity. Wash. Rev. Code §§
 2 49.46.010; 49.46.130. Generally, Washington courts follow federal law when
 3 addressing issues under MWA. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wash. 2d
 4 853, 862 n.6 (2004) (“The FLSA is persuasive authority because the MWA is based
 5 on the FLSA. Like the MWA, the FLSA requires overtime pay of one and one-half
 6 times the regular rate for every hour worked beyond 40.” (Citations omitted)).

7 At the hearing, Plaintiff agreed that resolution of his Washington Minimum
 8 Wage Act claim is dependant on the resolution on his FLSA claim.⁶ Because the
 9 Court concludes that Plaintiff is an exempt employee under the FLSA, he is also an
 10 exempt employee under the MWA, and therefore, is not entitled to overtime pay.

11 **IV. Breach of Contract Claim**

12 Defendant asserts that Plaintiff’s breach of contract claim should be
 13 dismissed as a matter of law because Plaintiff’s only avenue for collecting overtime
 14 compensation is under the FLSA.⁷ The Court agrees. Claims that are directly
 15 covered by the FLSA (such as overtime claims) must be brought under the FLSA.
 16 *Williamson v. General Dynamics Corp.*, 208 F.3d 1144, 1154 (9th Cir. 2000).
 17 Plaintiff’s claim for breach of contract for overtime pay is preempted by the FLSA.

18 Accordingly, **IT IS HEREBY ORDERED:**

- 19 1. Defendant’s Motion for Summary Judgment (Ct. Rec. 10) is **GRANTED**.
- 20 2. The Clerk of Court is directed to enter judgment in favor of Defendant.

21 _____
 22 ⁶In his response to Defendant’s Motion for Summary Judgment, Plaintiff did
 23 not address separately Defendant’s arguments that summary judgment is
 24 appropriate for his Washington Minimum Wage Act claim; rather Plaintiff
 25 incorporated his arguments to apply to both the FLSA and the MWA.

26 ⁷In his response to Defendant’s Motion for Summary Judgment, Plaintiff did
 27 not address Defendant’s arguments that summary judgment is appropriate for his
 28 breach of contract claims.

**ORDER GRANTING DEFENDANT’S MOTION FOR SUMMARY
 JUDGMENT ~ 19**

1 **IT IS SO ORDERED.** The District Court Executive is hereby directed to
2 enter this Order, furnish copies to counsel, and close the file.

3 **DATED** this 11th day of September, 2006.

4
5 *s/ Robert H. Whaley*

6 **ROBERT H. WHALEY**
7 Chief United States District Judge

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